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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 437

THOMAS GOTTONE, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

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Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled case on May 10, 1965.

CITATIONS TO OPINION BELOW

The findings and order on motion to suppress evidence of the United States District Court for the District of Colorado (R. 13-15) is unreported and is printed in Ap-

pendix B hereto, *infra*, p. 8. The opinion of the Circuit Court of Appeals, printed in Appendix B hereto, *infra*, p. 11, is reported in 345 F.2d 165.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 10, 1965. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

QUESTIONS PRESENTED

1. Whether a fact finder and appellate court in determining whether items are instrumentalities of crime and therefore subject to seizure, may so infer because the Petitioner invoked the protection of the Fifth Amendment against self-incrimination.

2. Whether the materials taken from the person, automobile and premises of the Petitioner were seized as part of an unreasonable search and seizure in violation of the Fourth and Fifth Amendments to the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendments IV and V to the United States Constitution are involved in this proceeding. They are printed in Appendix A, *infra*, p. 7.

STATEMENT

Petitioner filed a motion to suppress evidence with the United States District Court for the District of Colorado, on September 4, 1964 under Rule 41(e) of the Federal Rules of Criminal Procedure (R. 1-4). Petitioner sought the return of property and the suppression of its use as evidence on the following grounds:

A. The property was seized as the result of an unreasonable search.

B. The property is specifically immune from search and seizure.

C. Petitioner's rights under the Fourth and Fifth Amendments to the United States Constitution were violated.

The search and seizure complained of by Petitioner were made under the purported authority of two search warrants issued by the United States Commissioner at Denver, Colorado, on August 28, 1964. The District Court elected to treat Petitioner's motion as a proceeding ancillary to the Commissioner's proceeding; and a hearing on the motion was set for September 15, 1964, designated as Commissioner's No. 23458. The Court initially held that Petitioner had the burden of going forward.

The Court heard testimony on the circumstances of the search and seizure and each of the items sought to be recovered by Petitioner was introduced into evidence (R. 17-59). The Petitioner categorically denied that the items seized were used in connection with a business of accepting wagers (R. 28). On cross examination the petitioner successfully invoked the protection of the Fifth

Amendment. The government offered *no evidence* that the items were instrumentalities of crime. With exceptions not material to this Petition, the Court entered its findings and order denying the motion to suppress, on September 28, 1964 (R. 13-15), as follows:

> A. The subject materials constitute bookkeeping records and/or wagering paraphernalia as described in the various search warrants.
>
> B. None of the subject materials constitutes private papers or evidence of crime (as opposed to gambling paraphernalia), warranting suppression on the theory of *United States v. Lefkowitz*, 285 U.S. 452.

The United States Circuit Court of Appeals for the Tenth Circuit determined that the District Court's denial of Petitioner's motion is an appealable order and affirmed the District Court's finding that from the totality of circumstances the items sought to be recovered by Petitioner and suppressed as evidence were, as a matter of fact, gambling paraphernalia. The government conceded on appeal that the items taken were not subject to seizure as required records. The Court of Appeals held that the District Court's findings and order were not clearly erroneous as a matter of law and stated that Petitioner's invocation of the Fifth Amendment rendered his testimony of no probative value.

REASONS FOR GRANTING THE WRIT

1. The affirmance by the Court of Appeals of the trial court's finding that Petitioner's testimony is to be disregarded because he invoked the protection of the Fifth Amendment is shocking. No claim was made that Petitioner had waived the protection of the Fifth Amendment; Petitioner's invocation of the Fifth Amendment was upheld. Nevertheless, the inference was drawn from the Petitioner's invocation of the Fifth Amendment that the items seized were instrumentalities of crime. This is the very type of inference which courts must prevent juries from making, not make themselves. *Johnson v. U.S.*, 318 U.S. 189 at 196 (1943); *Bruno v. U.S.*, 308 U.S. 287 (1939). This prohibition has recently also been applied to the state. *Griffin v. California*, 380 U.S. 609 (1965).

2. The decision of the Court below in the instant case and the holding in *United States v. Clancy*, decided by the United States Court of Appeals for the Seventh Circuit, 276 F 2d 617 (reversed on other grounds, 365 U.S. 312), are in direct conflict with the decision of this Honorable Court in *United States v. Lefkowitz*, 285 U.S. 452. The protective maxim afforded by the Fourth and Fifth Amendments to the United States Constitution which clothes private papers with immunity from search and seizure, first stated by this Honorable Court in *Gouled v. United States*, 255 U.S. 298 (1921), was explicitly affirmed in *United States v. Lefkowitz*, 285 U.S. 452. The immunity is mandatory, notwithstanding a valid search warrant, in prohibiting exploratory and general searches for the sole purpose of finding evidence of some crime. The *Lefkowitz* directive is conclusive in the absence of a finding that the items seized are contraband or instru-

mentalities of crime. Such a finding in Petitioner's case as reflected by the evidence is clearly erroneous as a matter of law and obnoxious for the reasons stated above.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

WALTER L. GERASH,
1700 Broadway,
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Telephone 825-1414,
Counsel for Petitioner.

APPENDIX A

AMENDMENT IV — CONSTITUTION OF THE UNITED STATES — SEARCHES AND SEIZURES

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

* * * * *

AMENDMENT V—CONSTITUTION OF THE UNITED STATES—CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor to be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Commissioner's No. 23458

THOMAS GOTTONE, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

FINDINGS AND ORDER ON MOTION TO SUPPRESS EVIDENCE

This cause coming on to be heard on Motion of Thomas Gottone to Suppress Evidence, and having heard the testimony of the petitioner and the argument of counsel thereon, and having examined all materials prayed to be suppressed and returned, except $98.00 cash taken from the person of Thomas Gottone, and all of the materials examined, and counsel for petitioner having stated that there is no objection to said warrants on the ground that there was no probable cause for believing the existence of the grounds on which the warrants were issued, or that any of the warrants were illegally executed, and the Court having been advised that the sole objections to said warrants are because the property seized was not as described in said warrants or that they constituted possible evidence of but not means or instrumentalities of violation of the sections of the Internal Revenue Code cited in said warrants, and being fully advised in the premises, this Court finds as follows:

1. That petitioner has not applied for or received a wagering stamp pursuant to the provisions of the Internal Revenue Code, 1954, nor registered as provided in Section 4412, Internal Revenue Code, 1954.

2. That Exhibit 18 (Slip of Paper with written notation: "See Mr. Tailsman at Noon") and Exhibit 19, ("List of Horse Tracks) do not constitute gambling paraphernalia.

3. That the remaining materials consist of:

(a) A list of names and addresses (Exhibit 2).

(b) Miscellaneous notations and memranda (Exhibits 1, 3, 4, 5, 6, 7, 8, 9, 11, 14, 15, 16 and 20).

(c) A scratch pad of the type normally available at drug and five-and-ten cent stores, the top page of which contains impressions of notations and memoranda similar to those contained in the exhibits referred to in subparagraph (b) above.

(d) 38 Centennial Race Track programs with markings purporting to show which horses won, placed, and showed in each race and the combinations which won each daily double and quinella (Exhibit 10).

(e) Centennial programs for August 24 and August 27, 1964, with the information indicated above incompletely marked (Exhibits 12 and 13).

4. That all of the materials referred to in paragraph 2 constitute bookkeeping records and/or wagering paraphernalia as described in the various search warrants, and that the various sheets of paper introduced in evidence constitute bookkeeping records of the petitioner.

That the materials admitted into evidence, other than Exhibits 18 and 19 discussed in paragraph 2 of findings herein do not constitute such private papers or evidence of crime (in contradistinction to gambling paraphernalia) as to entitle them to be suppressed on the theory of *United States v. Lefkowitz*, 285 U.S. 452.

6. That the currency seized from the petitioner is one of the materials authorized to be seized, and should not be returned to petitioner, and the petitioner has not sustained his burden of proof to entitle him to the return thereof.

IT IS THEREUPON ORDERED AND ADJUDGED AS FOLLOWS:

a. Exhibits 18 and 19 filed in this cause are ordered returned to petitioner.

b. Exhibits 1 through 17 inclusive and Exhibit 20, filed in this cause shall not be suppressed or returned to petitioner, but shall be returned to the Intelligence Division, Internal Revenue Service, upon appropriate receipt and furnishing of accurate reproductions in accordance with the Court's order of September 18, 1964.

c. The currency seized shall be retained by Intelligence Division, Internal Revenue Service.

Dated at Denver, Colorado, this 28th day of September, 1964.

BY THE COURT:

ALFRED A. ARRAJ, Chief Judge
United States District Court

APPENDIX B

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 7955 — March Term, 1965

THOMAS GOTTONE, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

Appeal from the United States District Court
for the District of Colorado

[May 10, 1965]

Stanley L. Drexler (Lawrence G. Empey was with him on the brief) for Appellant.

David I. Shedroff, Assistant United States Attorney, (Lawrence M. Henry, United States Attorney, was with him on the brief) for Appellee.

Before MURRAH, Chief Judge, and LEWIS and SETH, Circuit Judges.

LEWIS, Circuit Judge.

This is an independent proceeding filed by motion under Rule 41(e), Fed. R. Crim. P., wherein the appellant-movant sought to suppress and have returned to him certain papers and materials taken from his person, automobile and home by agents of the United States. Appellant is not under arrest nor is an information or indictment outstanding against him. Since the motion is not made in nor dependent upon a case *in esse*, the District Court's denial of such motion is an appealable order, Go-Bart Importing Co. v. United States, 282 U.S. 344, 356, and within the exception set forth in DiBella v. United States, 369 U.S. 121, 131-32.

Appellant does not hold a wagering stamp nor is he registered as provided for in section 4412, Internal Revenue Code, 1954. On August 28, 1964, agents of the Internal Revenue Service applied for and were granted Commissioner's search warrants authorizing the search of appellant's person, automobile and home for "bookmaking records and wagering paraphernalia consisting of memoranda of wagers made, bet slips, account sheets or books relating to wagers, bettors' code identification list; recap sheet or sheets, schedules of sporting events on which point spreads (the line) are recorded, and money used in or derived from a bookmaking operation which are, have been, and will be used in violation of Sections 4401, 4411, 4412, 7201, 7203 of the Internal Revenue Code of 1954." The validity of the warrants is not questioned and appellant's sole contention is that the articles seized are private papers and not instrumentalities of crime. In other words, appellant asserts that the seizure resulting from the lawful search exceeded the authority of the warrants and was thus unreasonable and constitutionally prohibited. There is no doubt but that the objects sought for and described in the

warrant can constitute instrumentalities of crime (gambling paraphernalia), United States v. Clancy, 7 Cir., 276 F.2d 617, 629-30, reversed on other grounds, 365 U.S. 312; see also Harris v. United States, 331 U.S. 145, and our inquiry is thus whether the materials discovered and seized fall under the authority of the warrant or result from and are the fruit of an exploratory search prohibited either with or without a warrant. United States v. Lefkowitz, 285 U.S. 452.

Without describing in detail each of the exhibits which constitute the papers and articles seized it is sufficient to state that included therein is $98 in cash taken from appellant's person, lists of names and addresses with unexplained notations thereon, race track programs and results, and numerous slips of paper showing such notations as "Phils. 7/10 50," "Minnesota-13/20 75," "Sox (E) 30." In support of his motion for the return of the property, appellant testified that none of the seized articles were used by him as instruments of accepting wagers. However, he refused to submit to cross examination upon his statements choosing, rather, to seek shelter of the Fifth Amendment. Under such circumstances we think his testimony has no probative value and does not aid in determining the nature of the seized papers nor in sustaining his burden of showing a right to the return of the property.

Nor can we say, as a matter of law, that the seized papers are not instrumentalities of crime or are not within the specifics of the warrant.[1] It is true that a list of names and addresses may be completely innocuous but such list,

[1]Although the trial court found the materials to be "bookkeeping records and/or wagering paraphernalia" the government now concedes that the "required records" doctrine is not applicable to the case at bar. Compare Shapiro v. United States, 335 U.S. 1.

accompanied by unexplained symbols, may be a betting list; and certain it is that when such a list is found together with many memoranda such as "Phila. 7/10 50" which give rise to inferences of odds and wagers on a sporting event, the likelihood that such a list is a simple private paper is lessened. The trial court specifically found from the totality of circumstances that the papers were, as a matter of fact, gambling paraphernalia, and we will not upset that finding unless it is clearly erroneous or to prevent manifest injustice. This is not such a case. Compare Weed v. United States, 10 Cir., 340 F.2d 827, 828, with, Murray v. United States, 10 Cir., 333 F.2d 409, 412.

The judgment is affirmed.[2]

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[2]Although we entertain considerable doubt that the $98 taken from appellant's person can be categorically lumped with the other seized property we are not asked to give consideration to this aspect of the case either in brief or argument. Appellant's counsel stated, upon inquiry, that his interest in result was limited to the lists of names and addresses.